SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1133

EHRET COMPANY, A CORPORATION,
Petitioner,

vs.

EATON YALE & TOWNE, INC., A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BLEED THROUGH

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 11, 1975. (Petition for Rehearing denied on November 12, 1975)

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (App. A9-A17) is reported in 523 Fed. 2d 280. The opinion of the United States District for the Northern District of Illinois, Eastern Division (App. A1-A8) was not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on September 11, 1975. Rehearing was denied on November 12, 1975. The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. In passing on a motion for new trial does the trial court's erroneous exclusion from his consideration of evidence which was considered by the jury deprive a litigant of its right to trial by jury?

2. Should this court exercise its supervisory power to preserve the right to trial by jury when a trial court passing on motion for new trial has excluded evidence which it acknowledges supports the verdict and the Court of Appeals has ignored the issue of the propriety of that exclusion?

3. Whether an order of remittitur should be appealable without the necessity of a second trial. The Circuits are in conflict on this point.

CONSTITUTIONAL PROVISION.

The Seventh Amendment of the United States Constitution reads:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE.

The facts contained in the opinion of the Court of Appeals (App. A9-A17) are correctly stated and to avoid repetition are not repeated here.

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Petitioner Ehret Company, an Illinois Corporation, filed this action against respondent Eaton Yale & Towne, Inc., an Ohio corporation, seeking to recover from Eaton all commissions due Ehret Company under certain sales agreements between the parties. The suit was filed in the United States District Court on the basis of diversity of citizenship.

Before trial, on motion for partial summary judgment, the District Court initially held that "extremely fair treatment" consisted of commissions on orders shipped within one year after cancellation. On reconsideration the court concluded that that issue was a question of fact for the jury.

Neither Eaton or the court attempted to restrict the evidence which the jury could consider in determining the meaning of "extremely fair treatment." Nor was any instruction tendered regarding the relative importance of the evidence offered to prove the meaning of that phrase.

At both trials the court instructed the jury:

> The law does not say what extremely fair treatment means. That is for you to decide based on all the evidence which you find has a bearing on determining the intent of the parties. (T 1. 648, T 2. 608)

In ordering the remittitur the court found no trial error and concluded that the verdict was not based on passion and prejudice. The trial court said:

> When the words "extremely fair treatment" are considered by themselves, there is room for reasonable persons to reach the verdict rendered . . . When the phrase is viewed in the totality of circumstances surrounding the party's business relationship the verdict is also supportable: the contract provides for development commission; there was evidence as to the length of time required to develop sales; etc. However, the totality of circumstances is not considered until the language is measured against the remainder of the contract and, when this is done, the court finds that the verdict is excessive. (App. 75).

* * * * *

> The "extremely fair treatment" clause does create a question of fact as to the length of time during which commissions were to be received following termination. However, the evidence does not support a finding that the parties intended more than a one year time span. (App. A6)

Ehret Company did not consent to the remittur, but petitioned the Court of Appeals for the Seventh Circuit for a writ of certiorari. This was denied and the second trial resulted in a verdict in favor of Ehret Company for $120,000.00.

On appeal Ehret Company raised two points regarding the remittitur:

1. The trial court's error of law in failing to consider the surrounding circumstances when passing on the motion for new trial; and
2. The abuse of discretion in ordering a remittitur.

The Seventh Circuit's opinion (App. A9-A17) states:

> The plaintiff's (Ehret) contention on its appeal is that the trial judge abused his discretion by offering a remittur and granting a new trial. (App. A15-A16)

The court then concludes that there was no abuse of discretion. (App. A16) The opinion does not discuss the propriety of the District Court's exclusion of the evidence of surrounding circumstances when passing on the motion for new trial. Yet when passing on Eaton's appeal from the second verdict the court held that extrinsic evidence was properly admitted. (App. A14)

REASONS FOR GRANTING THE WRIT.

I.

Plaintiff Has Been Deprived of Its Right to a Jury Trial in Violation of the Seventh Amendment.

In this case the trial court re-examined the evidence considered by the jury and concluded that it supported the verdict of $546,000.

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The court then excluded certain evidence that the jury had considered and upon examining the remaining evidence concluded that Ehret Company was entitled to only $182,000.

It is well established that a trial court's re-examination of the facts when passing on a motion for new trial is in accordance with the rules of the common law and, therefore, does not violate the right of trial by jury contained in the Seventh Amendment to the United States Constitution.

However, it is fundamental that the trial court must re-examine all of the facts which were presented to the jury. Because the jury utilized all the facts in reaching its conclusion, any evaluation of that conclusion must be made in light of those same facts.

In the instant case the trial court did not consider the same facts which the jury considered.

Extensive evidence of the circumstances surrounding the parties' business relationship was presented to the jury. The trial court held that when these circumstances were considered the jury's verdict was supportable. (App. A5)

But the trial court then ruled that these circumstances are not to be considered and found that when the circumstances were excluded the verdict was excessive. (App. A5)

Even when the trial judge has considered the same evidence as the jury did, he may not substitute his judgment for that of the jury merely because the jury could have drawn different inferences or conclusions or because he feels another result more reasonable. *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35 (1944).

In this case the trial judge has done more than substitute his judgment for that of the jury. He has decided the proper amount of Ehret Company's recovery on the basis of an entirely different set of facts.

Instead of re-examining the evidence the trial judge gave the parties a new trial based on different evidence. But the new

trial was a bench trial when the parties had requested a jury trial.

Most important, the evidence which the trial judge excluded from his consideration was proper evidence. The law is that the previous agreements, negotiations and circumstances may be considered in determining the meaning of specific words and clauses in written instruments. *Ortman* v. *Stanray Corporation*, 7 Cir., 1971, 437 F. 2d 231, 234-236. Ironically, the Court of Appeals held that such evidence was properly admitted at the second trial. (App. A14)

Even the trial judge found the verdict supportable if the circumstances surrounding the parties' business relationship were considered. Such circumstances were proper evidence and were considered by the jury.

By ordering the remitter the trial judge forced the plaintiff to accept the results of a *de novo* bench trial on different evidence or submit to a second jury trial. This constitutes a deprivation of plaintiff's right to trial by jury.

II.

The Combined Conduct of the District Court and the Court of Appeals Calls for an Exercise of This Courts Power of Supervision.

The trial court found that when all the evidence, including the surrounding circumstances, were considered the amount of the verdict was supportable. (App. A5)

Then the trial court excluded the surrounding circumstances and found the verdict was excessive and ordered a remittitur. (App. A5)

The Court of Appeals held that extrinsic evidence was properly admitted at the second trial. (App. A14)

In determining whether the remittitur was an abuse of discretion, the Court of Appeals said great weight must be given

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to the trial court's opportunity to view the "living courtroom". (App. A16)

If the extrinsic evidence was proper, if the trial court concluded that when that evidence was considered the verdict was supportable and if great weight is to be accorded the trial court's conclusions then the remittitur should have been reversed and the first verdict reinstated.

Yet the Court of Appeals did just the opposite—it affirmed the remittitur.

The trial court found no error in the first trial. It also found that the first verdict was not the result of passion or prejudice. (App. A7) According to the trial court the only "error" that evidence of surrounding circumstances should not be considered and when not considered Ehret was entitled to only one year of development credit.

Thus, the trial court used the exclusion of evidence as a vehicle to conform the verdict to its own prejudgment of damages at the time of the partial summary judgment.

However, the evidence of surrounding circumstances had been admitted without objection and, without objection, the court had instructed the jury to consider "all the evidence."

More significant is the fact that at the second trial neither Eaton or the court attempted to exclude or limit evidence of surrounding circumstances and again, without objection, the jury was told to consider "all the evidence." (T2 608) By not correcting the "error" at the second trial all that was accomplished was to give Eaton two bites of the apple.

The need for supervision is obvious. Ehret was deprived of a jury verdict on the sole ground that certain evidence should not have been considered. Yet when Ehret refused the remittitur, that same evidence was admitted and the jury told they could consider that evidence.

On appeal the Court of Appeals ignored Ehret's primary contention that it was an error of law for the trial court to

exclude evidence of surrounding circumstances when passing on the motion for new trial. Instead the court considered only Ehret's alternative contention—that the trial court abused its discretion in ordering a remittitur.

To make matters worse, in its consideration of the abuse of discretion issue the Court of Appeals either mistakenly thought the trial court had considered the surrounding circumstances when it found the verdict excessive or it inconsistently held such evidence improper at the first trial and proper at the second. Neither could have occurred if the reviewing court had squarely faced the primary issue presented to it by Ehret.

Any verdict can be set aside if the trial court may refuse to consider that evidence which supports the verdict. The ruling to exclude evidence on a motion for new trial is one of law and subject to review. *Fairmount Glass Works* v. *Cub Fork Co.*, 287 U. S. 474, 482-483 (1933). If such rulings are not reviewed a trial court would always be free to become the trier of fact.

The right guaranteed by the Seventh Amendment cannot survive if trial courts are free to ignore evidence which allowed a jury to reach a verdict contrary to the result the Court would have reached in a bench trial. The only safeguard against infringement of the right to jury trial by this method is review. If the reviewing court is free to ignore such conduct when it is specifically called to its attention then no safeguard exists at all. Unless, of course, this court exercises its supervisory function and issues a writ of certiorari.

III.

The Conflict Among the Circuits Should Be Resolved in Favor of Allowing an Appeal from a Remittitur Order.

There is no Federal Rule of Civil Procedure governing remittitur. The Circuits are in conflict regarding appeals from such orders.

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The Seventh Circuit does not allow an appeal unless the remittitur is refused and a new trial held. *Dorin* v. *Equitable*, 7 Cir., 1967, 282 F. 2d 73.

The Sixth Circuit follows the State rule under the *Erie* Doctrine. *Mooney* v. *Henderson Portion Pack Co.*, 6 Cir. 1964, 334 F. 2d 7.

The Fifth Circuit allows the remittitur to be tested on appeal when the plaintiff agrees to the remittitur under protest. *United States* v. *1,160 Acres*, 5 Cir., 1970, 432 F. 2d 910.

The trial court's ordering such an outrageously large remittitur ($408,119.25) not only deprived the plaintiff of trial by jury, but, in addition, placed the plaintiff in the difficult situation of being unable to seek review of the trial court's remittitur order under the rule of the Seventh Circuit unless willing first to try the case a second time.

The use of the remittitur order in mandatory conjunction with the order for a new trial violates every standard of fairness ordinarily applied to litigants. It allows the trial court to impose its view of the evidence without fear of review until the case is retried. Even then if the result does not conform to the trial court's view of the case, finality and consequently review can be withheld by the use of a second remittitur order.

Such unfairness is especially harsh in the instant case where the trial court agreed that the verdict was not the result of passion or prejudice, but based the order on a ruling of law which is reviewable. When such rulings are erroneous, as this one was, a second trial is a waste of judicial effort and an unnecessary expense to litigants.

This court in its supervisory capacity of Federal District Courts and Courts of Appeal ought to grant this petition for Writ of Certiorari to review the use of remittitur in the trial courts, which is presently not governed by the Federal Rules of Civil Procedure. Fundamental fairness requires that at a minimum a remittitur order should be reviewable by the courts of appeal even if accepted by the plaintiff.

The rules of both the Fifth and Seventh Circuit are overly harsh and are an example of anachronistic common law procedures which have no place in the modern complex litigation that is typical of today's Federal courts. The Rules should help the disposition of cases, not impede their progress by requiring two trials before finality can be obtained.

The Federal Rules themselves should be amended and we have proposed this amendment to Rule 59, which would add a new section on remittitur:

> (f) Remittitur. Consenting to a remittitur as a condition to a denial of a new trial does not preclude the consenting party from asserting on appeal or cross-appeal that the amount of the verdict was proper."

Such a rule would modernize the remittitur practice and prevent injustice.

CONCLUSION.

For the foregoing reasons this Petition should be granted.

Respectfully submitted,

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APPENDIX.

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT

[Filed February 26, 1974]

This action for damages on the termination of a sales commission arrangement was tried by a jury and resulted in a verdict for plaintiff in the amount of $546,000. The matter is now before the Court on defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial and on plaintiff's motion to amend the complaint. The motions are granted in part and denied in part.

The amended complaint is offered on the theory that it brings the pleadings into conformity with the evidence. The proposed changes primarily relate to the Milwaukee territory which is the subject matter of Count III. The original complaint alleged that plaintiff acted as defendant's exclusive sales representative in the Milwaukee territory pursuant to an informal agreement. Count III of the proposed amended complaint incorporates by reference paragraphs 7 and 8 of Count I wherein it is alleged that plaintiff's predecessor, on April 30, 1965, entered into sales agreements with certain of defendant's divisions—Exhibits A, B, C and D—and entered into another agreement on March 31, 1966 which was necessitated by defendant's change of name. In short, the proposed amended complaint apparently is an attempt to bring the Milwaukee territory within the written agreements.

The written sales agreements refer only to portions of Illinois, Indiana and Iowa. The case was tried on the theory that it was a question of fact as to whether defendant's promise of "extremely fair treatment" in the event of cancellation of the written agreement applied to the Milwaukee territory and the jury was

instructed on that theory. The evidence does not support the proposed amendment and the motion to amend is accordingly denied.

In the original motion for a judgment n.o.v. or new trial, eight grounds were presented in support of the motion for judgment n.o.v. and five grounds were presented in support of the alternative motion for a new trial. Certain of these points are not discussed in the subsequently filed supporting memorandum and those points not discussed are deemed to have been waived.

The case centers on whether Ehret Company ("Ehret"), a sales representative for defendant, received the payments to which it was entitled upon the termination of the sales agreement existing between it and Eaton Yale & Towne, Inc. ("Eaton"). The contract drafted by Eaton and submitted to Ehret for acceptance provided for payment of commissions on orders received prior to termination and shipped within three months thereafter. Upon Ehret's objections to this provision, Eaton's general sales manager, Mr. L. O. Witzenburg, sent a letter to Mr. E. J. Ehret which outlined the "normal procedure" and stated that "in the very unlikely event of cancellation, you will have to rely on receiving extremely fair treatment." In an opinion dated September 6, 1972 the Court held that Eaton was estopped from repudiating that letter, said letter being part of the existing agreement.

The jury was instructed that the "extremely fair treatment" clause applied to the Chicago-Davenport territory and, as noted above, it was left to the jury to decide whether the clause also applied to the Milwaukee territory.[1] The questions of the intent of the parties regarding the "extremely fair treatment" clause and the extent of damages, if any, were also submitted to the jury. The jury returned a verdict in favor of the plaintiff in the

1. Plaintiff contends that defense counsel conceded in opening argument that the clause applied to the Milwaukee territory and that defendant is bound by this statement. It is unnecessary to decide this point here, however.

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amount of $409,500.00 as to the Chicago-Davenport territory and $136,500 as to the Milwaukee territory.

Eaton argues in support of its motion for judgment n.o.v. that Ehret should be estopped from denying its construction of the "extremely fair treatment" clause. It relies on four letters written by Ehret's president which suggest that his understanding was that commissions were to be paid on orders placed prior to termination on September 30, 1968, but shipped within three months[2] to one year[3] thereafter.

These letters are certainly relevant evidence of the praties' intent and were properly before the jury on that issue. The Court is of the opinion, however, that such letters do not bind Ehret to a particular position on the theory of equitable estoppel.[4]

For the doctrine of equitable estoppel to apply, there must be a change of position based upon statements or conduct of the party to be estopped. *Dill* v. *Widman,* 413 Ill. 448, 109 N. E. 2d 765 (1952), *as modified on denial of rehearing* (1953). There were extended negotiations between the parties and positions changed during that period. The evidence does not prove, however, that these letters were the basis for Eaton's ultimate position.

Furthermore, Mr. Dingle's letter of August 26, 1968 indicates that as early as August 16, 1968 Eaton had agreed to consider some payment to Ehret for long standing orders that were not shipped within three months of termination. In short, even before Mr. Ehret wrote the letters upon which Eaton relies to establish estoppel, Eaton was considering payment for orders

2. Letter to John R. Dingle dated August 21, 1968.

3. Letter to Joseph A. Reising dated October 22, 1968.

4. Plaintiff contends that defendant actually raises the defense of accord and satisfaction. It further contends that accord and satisfaction and estoppel are affirmative defenses which must be pleaded, Fed.R.Civ.P. 8(c), and since such matters were not alleged, the issue cannot be asserted at this time. Because the Court finds the defendant's argument to be without merit, the points shall not be considered here.

with long-term delivery dates. During the early stages of the negotiations, its position was thus not as hardened as it eventually became. Under these circumstances it is virtually impossible to determine what changes in position, if any, were made in reliance on statements of a particular person. It may very well be that Eaton arrived at its settlement offer out of fear that Ehret intended to enlarge its demand and sue thereon.

Defendant contends that it is entitled to judgment n.o.v. because there was no evidence to support plaintiff's interpretation of the "extremely fair treatment" clause. Defendant's position is that all the relevant evidence suggests that the parties intended that the clause apply only to orders received by Eaton prior to termination.

The standards to be applied in construing a written contract are set forth in *Southwest Forest Inds., Inc.* v. *Sharfstein*, 482 F. 2d 915, 919 (7th Cir. 1972):

> "It is elementary, of course, that the keystone of contract interpretation is to ascertain the intention of the parties from the language they used. The meaning of the words which the parties employed is found by focusing on the words themselves and then drawing back and testing that meaning in the context of the entire contract or, as here, in the combined context of the stock agreement and employment contracts. This test must finally be read against the background of the circumstances and situation with which the parties were dealing."

In order to establish a basis in the record for the jury's verdict, plaintiff argues that it equates to the development commission in the two territories for a three year period. Plaintiff's closing argument urged that these development commissions were the proper measure of damages. Such an explanation is plausible and for purposes of this motion it shall be assumed *arguendo* that the jury based its decision on development commissions.

On a motion for judgment n.o.v. the standard is whether reasonable persons, drawing all reasonable inferences from the

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evidence when viewed in the light most favorable to the opponent of the motion, may reach different conclusions in a fair and impartial exercise of their judgment. *Hannigan* v. *Sears, Roebuck & Co.*, 410 F. 2d 285, 287-88, *cert. denied*, 396 U. S. 902 (1969); *Continental Air Lines* v. *Wagner-Morehouse, Inc.*, 401 F. 2d 23, 27 (7th Cir. 1968); *Funk* v. *Franklin Life Ins. Co.*, 392 F. 2d 912, 915 (7th Cir. 1968).

According to *Southwest Forest Inds. Inc.* v. *Sharfstein, supra,* three elements are involved in determining the intent of the parties: (1) the words by themselves; (2) the words in the context of the entire contract; and (3) the totality of circumstances in which the parties acted.

When the words "extremely fair treatment" are considered by themselves, there is room for reasonable persons to reach the verdict rendered. In fact, those words are so ambiguous that taken by themselves they are of little assistance in arriving at intent. When the phrase is viewed in the totality of circumstances surrounding the parties' business relationship the verdict is also supportable: the contract provides for development commissions; there was evidence as to the length of time required to develop certain sales; etc. However, the totality of circumstances is not considered until the language is measured against the remainder of the contract and, when this is done, the Court finds that the verdict is excessive.

In Mr. Ehret's letter objecting to the termination provision in the tendered contract he raised three issues: (1) his obligation to his partner, Mr. Kinzie; (2) the fact that preliminary work may have been done, but an order might not be received for a period of time; and (3) once an order is received, the delivery of the merchandise may be delayed. It was in response to this that the "extremely fair treatment" letter was written. In that letter Witzenburg stated that Eaton had "always been much more liberal than provided for in the contract" and he referred to two cases in which the delivery period qualifying for commissions was as long as one year.

The "extremely fair treatment" clause does create a question of fact as to the length of time during which commissions were to be received following termination. However, the evidence does not support a finding that the parties intended more than a one year time span. Assuming *arguendo* that development credit is the proper measure, the verdict is clearly excessive in that approximately three years' credit was awarded. (In this connection, also, it should be borne in mind that the bulk of Ehret's customers were already Eaton customers when Ehret, et al. were Eaton employees, prior to their becoming manufacturers' representatives.)

On the other hand, defendant's motion for judgment n.o.v. in the amount of $7,222.16 must be denied since it seeks to limit commissions to those orders received prior to termination. In the "extremely fair treatment" letter Witzenburg stated that "[t]he normal procedure is to allow full credit for all orders received within 30 days after final cancellation date. . . ." In short, reasonable persons could infer from the Witzenburg letter that commissions would be paid on orders received for a period of time after termination.

Because the Court is convinced that the verdict is excessive, it feels compelled to grant defendant's motion for a new trial in the event plaintiff does not agree to a remittitur as set forth below.

Plaintiff contends that since defendant did not move for a remittitur within ten days of judgment, remittitur is unavailable. Defendant did move for a new trial within the specified period, however, and it appears that remittiturs may be considered on such a motion. 6A Moore's Federal Practice, ¶ 59.05[3] at 3737.

Defendant contends that remittitur is not appropriate here since the verdict was the result of appeals to passion and prejudice in plaintiff counsel's closing argument. Defendant relies on dicta in *Dorin* v. *Equitable Life Assurance Soc.*, 382 F. 2d 73, 77 (7th Cir. 1967). That dicta was based on *Minneapolis,*

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St. Paul & Sault Ste. Marie Ry. Co. v. *Moquin*, 283 U. S. 520, 522 (1931).

It would certainly be improper to grant plaintiff the option of remittitur if the finding of liability resulted from passion or prejudice. Here the Court held that the "extremely fair treatment" clause applied to the Chicago-Davenport territory and there is sufficient basis in the record for the jury to have found that it also applied to the Milwaukee territory. Passion or prejudice cannot, therefore, be said to account for that aspect of the verdict.

Neither is passion or prejudice a necessary explanation for other aspects of the verdict. Granted that plaintiff's counsel came close to the boundaries of permissible argument, the verdict can be explained in terms of misapprehension of the evidence with respect to the parties' intent on the period of time during which commissions were to be paid.

Various approaches have been taken in determining questions of remittitur, 6A Moore's Federal Practice ¶ 59.05[3]. This Court is of the opinion that it is proper to have remittitur only to such an extent that the verdict would no longer be excessive, the theory being that the jury intended to award the maximum amount possible and the plaintiff should be permitted to retain what is not actually excessive. Furthermore, as long as the excessiveness has been eliminated, such a solution does not work an injustice on the defendant.

Accepting as true that the jury selected development credit as the measure of "extremely fair treatment" and finding a basis for this, the Court is of the opinion that the maximum period of time justified by the evidence is one year rather than three. Accordingly, should the plaintiff agree, the Court shall enter judgment in the amount of $137,880.75.[5] Plaintiff shall have

5. The development credit figure for the five year period following termination amounts to approximately $910,000 or approximately $182,000 per year. From this $182,000 is subtracted $44,119.25, the amount already paid Ehret as commissions following termination.

twenty-one (21) days from the date of this opinion to file a consent to the remittitur. In the event this is not done, a new trial will be ordered.

ENTERED:

/s/ R. W. McLAREN
United States District Judge

Dated: February 26, 1974.

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OPINION OF THE COURT OF APPEALS

Before FAIRCHILD, *Chief Judge,* SWYGERT, *Circuit Judge,* and CAMPBELL, *Senior District Judge.**

FAIRCHILD, *Chief Judge.*

This appeal raises questions concerning the interpretation of an exclusive sales contract and the application of the parol evidence rule and promissory estoppel. It also raises the question whether the trial judge abused his discretion by offering a remittitur and granting a new trial. Jurisdiction is founded on diversity. All parties to this appeal have accepted Illinois law as controlling.

The plaintiff, Ehret Company, acted as a manufacturer's sales representative for the defendant, Eaton Company, in the Milwaukee and Chicago territories until the termination of their 1966 contract. This termination was effected by notice in compliance with the "Duration of Agency" clause and took effect on September 30, 1968.

There was evidence that the defendant's products, worm gears and lubricating systems, required the plaintiff to engage in "Development Work" of up to ten years prior to the consummation of a sale. It was necessary, during this presale development, for the plaintiff to engineer, design and adapt the defendant's products into either the customers' finished product or into the customers' own manufacturing equipment. Before signing the 1965 contract, Mr. Ehret objected to the "Duration of Agency" clause which reads:

> 12. *Duration of Agency*
> This Sales Agreement may be altered by our mutual consent and may be terminated by either of us upon thirty (30) days' notice in writing. In the event of cancellation of this Agreement or abridgment of the territory herein covered,

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

> no commission will be paid on any orders which have not been properly received, in writing, and accepted by us in writing before the termination of the Agreement or abridgment of the territory, or on orders which purchasers will not accept delivery of and pay for within three (3) months from the date of cancellation of the Agreement or abridgment of the territory.

His objections were raised in an April 28, 1965 letter to the General Sales Manager of Eaton Company, Mr. Witzenburg. Mr. Ehret showed concern for the possibility that Eaton Company could cancel the contract after Ehret Company had expended considerable time and money in procuring a sale, but before an order was placed, and also that orders placed prior to termination may not be shipped within 90 days.

On April 29, 1965, Eaton Company responded, with a letter from Mr. Witzenburg declining to change the contract, stating:

> It is true in the event of cancellation by either party, our company would not be obligated to pay a commission on orders that were received before the date of final cancellation but were not released for shipment three months after cancellation. However, in those few cases where the contract has been cancelled by us we have always been much more liberal than provided for in the contract.
>
> The normal procedure is to allow full credit for all orders received within 30 days after final cancellation date, provided that they resulted from quotations made prior to the date of cancellation and if released for shipment within five months of the date of cancellation. In fact, in two cases, we have extended that protection to orders received under the same circumstances but shipped within a period of one year after cancellation.
>
> Neither you nor we expect that the new contracts will be cancelled by either one of us, so that this discussion is probably academic only. However, we cannot alter the terms of the contract—the same contract must exist with you as with all of our other representatives and in the very unlikely event of cancellation, you will have to rely on receiving extremely fair treatment.

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After receiving Mr. Witzenburg's letter, Ehret Company entered into the Commission Sales Agreement containing the "Duration of Agency" clause on April 30, 1965.

On March 31, 1966, Eaton, Yale and Towne, Inc., formerly Eaton Company, sent a letter to the Ehret Company requesting that a new contract be signed reflecting the defendant's name change. This new contract, signed and dated June 2, 1966, contained the same "Duration of Agency" clause as the 1965 contract. In addition, the new contract contained an integration clause which stated that, "Upon its receipt, it will constitute an entire Agreement between us as of the date set forth above [January 1, 1966.] This Agreement cancels all prior Sales Agreements between us, including the latest one dated May 1, 1965."

On August 28, 1968, Eaton, Yale and Towne, Inc. sent a letter to Ehret Company terminating their 1966 agreement as to both the Chicago and Milwaukee territories, effective September 30, 1968. In this letter the defendant expressed its intent to construe literally the "Duration of Agency" clause stating, "In effecting this cancellation, full credit will be given your office for all acceptable orders dated September 30, 1968, and before, provided they are shipped prior to December 31, 1968." Later, and after negotiation, Eaton, Yale and Towne, Inc. agreed to pay Ehret Company on all orders received prior to termination regardless of when shipped. Eaton tendered this amount, $51,000.00, to Ehret Company, of which $44,000.00 was accepted.

The plaintiff contends that it is entitled to better treatment than described in the "Duration of Agency" clause, (and better than Eaton actually extended) relying on Mr. Witzenburg's April 29, 1965 letter which stated that, "you [Ehret Company] will have to rely on receiving extremely fair treatment."

The defendant's motion for summary judgment was denied. The plaintiff's motion for partial summary judgment was

granted, determining that defendant was estopped from asserting the "Duration of Agency" clause of the contracts to limit commissions. At trial, the defendant's motion for directed verdict was denied and the jury's verdict awarded plaintiff $546,000.00. The defendant's motion for judgment N. O. V. was denied and the defendant's motion for a new trial was granted after the plaintiff refused a remittitur of $408,119.25. The jury's verdict awarded $120,000.00 to the plaintiff in the second trial.

The plaintiff appeals challenging the order setting aside the first jury verdict and the granting of a new trial. On its appeal the defendant contends that the 1966 contract on its face is a complete representation of the agreement between the parties, and that in any event the plaintiff failed to prove damages based on the meaning of the "extremely fair treatment" letter.

The trial judge correctly held, as a matter of law, that the defendant was estopped from asserting the "Duration of Agency" clause of the 1965 and 1966 contracts. As stated in *Dill* v. *Widman*, 413 Ill. 448, 109 N. E. 2d 765, 769 (1952):

> The general rule is that where a party by his statements or conduct leads another to do something he would not have done but for the statements or conduct of the other, the one guilty of the expressions or conduct will not be allowed to deny his utterances or acts to the loss or damage of the other party. The party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts. Fraud is a necessary element but it is not essential that there be a fraudulent intent. It is sufficient if a fraudulent effect would follow upon allowing a party to set up a claim inconsistent with his former declarations.

All of the elements necessary to form an estoppel are present in this case. The plaintiff was induced to sign the 1965 and 1966 contracts only in reliance on the defendant's representation that it would not enforce the "Duration of Agency" clause, but would give "extremely fair treatment" in the unlikely event of termination. The plaintiff also relied on a letter, which

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preceded the 1966 contract, from Eaton Company stating that a new contract must be signed to reflect Eaton Company's name change. If the defendant were allowed to disclaim its representations after receiving the benefits therefrom, this would have the fraudulent effect that an estoppel was designed to prevent. Usually the question of estoppel is for the jury except where, as in this case, the facts presented leave but one inference; then it becomes a question of law. *Bituminous Casualty Corp.* v. *City of Harrisburg*, 315 Ill. App. 243, 42 N. E. 2d 971 (1942).

The Milwaukee territory was not mentioned in the written contracts, but evidence was adduced that the parties understood it to be covered by the same terms and conditions as the written Chicago agreement. The question was submitted to the jury, which found that the "extremely fair treatment" letter was also applicable to the Milwaukee contract and territory. This finding was not contested on appeal; therefore both territories are treated similarly for the purpose of this order.

The question of damages was submitted to the jury on the theory of a possible breach of a contract to give the plaintiff extremely fair treatment. Support for the treatment as an enforcible promise of the promise which, as a result of plaintiff's reliance, creates an estoppel is supported by Restatement, Contracts, § 90 and Restatement 2d, Contracts, § 90 (Tent. Draft No. 2, 1965). Following this view, admission of the "extremely fair treatment" letter is not in conflict with the parol evidence rule as the defendant contends. An estoppel is an equitable remedy which has its own independent force.

We now turn to the interpretation of the contract, specifically the "Duration of Agency" clause, as modified by the "extremely fair treatment" letter. The meaning of the term "extremely fair treatment" is neither plain nor clear, but is susceptible to numerous interpretations. Parol evidence is always permitted to assist in determining the meaning and effect of a contract term from the intent of the parties. *Ortman* v. *Stanray Corp.*, 437 F. 2d 231 (7th Cir. 1971). This is especially true

where the words used, by their very nature, are ambiguous. The trial court properly allowed the introduction of the extrinsic evidence, not to vary or contradict the written contract, but to explain a term which became part of the agreement by means of an estoppel.

The quantum of damages was dependent on the jury's determining the meaning of the phrase "extremely fair treatment," whether the plaintiff received "extremely fair treatment," and if not, what would compensate the plaintiff for commissions or allowances it would have received if it had been given "extremely fair treatment." The defendant contends that there was no evidence presented to support the jury's verdict. We disagree. There was sufficient evidence to establish that it took up to ten years for the plaintiff to develop a customer prior to an order being placed. It was this concern of the plaintiff that prompted the defendant's promise of "extremely fair treatment" and it was on this basis that the jury awarded damages.

The defendant's contention that the 1966 contract superseded its representation of "extremely fair treatment" we find to be without merit under the circumstances because of defendant's representation of the limited purpose of the 1966 contract.

We recognize that there is authority in jurisdictions other than Illinois for the proposition that the promise which becomes the basis for the estoppel is not to be enforced as a promise, and that damages, if awarded, "should be only such as in the opinion of the court are necessary to prevent injustice." *Hoffman* v. *Red Owl Store, Inc.*, 26 Wis. 2d 683, 701, 133 N. W. 2d 267, 276 (1964); *see generally*, 28 Am. Jur. 2d, Estoppel and Waiver § 49 (1966). We think, however, that in the circumstances of this case, this latter theory produces the same result as determining damages under the contract. Giving the estoppel only the effect of depriving defendant of its right to limit commissions due after termination to those computed according to the 1966 contract, and seeking only an amount of damage needed to produce an equitable result, plaintiff would be

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entitled to compensation, reasonably determined, for the time and effort it expended as the defendant's sales agent without being afforded sufficient opportunity to recoup from the venture. *Fargo Glass and Paint Co.* v. *Globe American Corp.*, 161 F. 2d 811, 813 (7th Cir. 1947); *Burton* v. *Hitachi America, Ltd.*, 504 F. 2d 721 (7th Cir. 1974).

The plaintiff's computation of damages is based on Eaton's sales figures for the five years after termination. Of this amount Ehret contends that it is entitled to the "development credit" portion of the commissions from customers that it had serviced while acting as Eaton's representative. The plaintiff borrowed the term "development credit" from the defendant's agreement which provided for the allocation of commission where one representative worked on a project for which an order was placed outside his territory. The representative who performed the "development work," described above, was entitled to 80% of the sales commission for the gear products and 60% of the sales commission for the lubrication products. For the five year period the portion of commissions equivalent to the development credit is equal to $910,000.00. The jury's verdict in the first trial was three-fifths of this amount, or $546,000.00. The trial judge held that a three year development credit was excessive and offered a remittitur which would bring the figure to less than one year over the commission already paid. Plaintiff elected not to remit. The basis for the jury award at the second trial is not readily apparent. It was less than the amount offered by the court.

Under the circumstances, we find no fault in using the Eaton Company's sales figures and the "development credit" concept for the years subsequent to the termination, to determine damages for the breach of defendant's promise to give "extremely fair treatment," or alternatively, an allowance of an amount necessary to prevent injustice.

The plaintiff's contention on this appeal is that the trial judge abused his discretion by offering a remittitur and grant-

ing a new trial. There is no doubt that the federal district court has the power to offer a remittitur and, if refused, grant a new trial. *Dimick* v. *Schiedt*, 293 U. S. 474, 55 S. Ct. 296, 79 L. Ed. 603 (1935). The standard for appellate review of a trial judge's order granting a new trial for an excessive verdict has been explained in *Taylor* v. *Washington Terminal Co.*, 133 U. S. App. D. C. 110, 409 F. 2d 145, 149 (1969), *cert. denied*, 396 U. S. 835, 90 S. Ct. 93, 24 L. Ed. 2d 85:

> The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within "the maximum limit of a reasonable change (sic)." [Emphasis in original.]

See also, *Gorsalitz* v. *Olin Mathieson Chemical Corp.*, 429 F. 2d 1033 (5th Cir. 1970), *cert. denied*, 407 U. S. 921, 92 S. Ct. 2463, 32 L. Ed. 2d 807 (1972); *Brewer* v. *Uniroyal, Inc.*, 498 F. 2d 973 (6th Cir. 1974). Since the damage issue in this case is dependent upon the interpretation of a vague term, or, in the alternative the determination of an amount or (sic) equitable grounds, we cannot say that the first jury verdict was clearly within this "reasonable range." On appeal, the trial judge's opportunity to view the "living courtroom" must be given great weight, especially when assessing the intent of the parties. We can find no abuse of discretion and accordingly affirm the judgment of the district court.

The Clerk of this court is directed to enter judgment affirming the judgment appealed from.

SWYGERT, *Circuit Judge* (dissenting).

I cannot agree with the majority's conclusion that it was proper to give the jury free reign to decide what constitutes "extremely fair treatment." I concur in the portion of the opinion upholding the finding of equitable estoppel based on the letter of April 29, 1975. But I do not understand why the majority

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concludes that the perimeters of this estoppel are to be based only on a single phrase of that letter, viewed out of context.

Equitable estoppel has been invoked in this case to override the written contract between these parties because it would be unfair to allow the defendant to rely on that contract in light of the April 29 letter. Yet, it seems to me, it is just as unfair to ignore the very instrument that necessitates the use of the equitable estoppel doctrine. I believe this is what the majority has done. We are concerned with a dispute arising in a commercial context. Certainly, Eaton, Yale & Towne never agreed that in case of cancellation plaintiff would receive whatever a jury thought to be "extremely fair treatment." In the same letter in which this now seized upon phrase was used, the "normal procedure" was specifically spelled out: full credit for all orders received within thirty days after final cancellation date and shipped, at most, within one year after cancellation. I think that the phrase "extremely fair treatment" must be read to refer to this statement of the normal procedure. The phrase must be given contours if we are to reach an equitable result and the contours are those contained in the same letter. It is interesting to note that to a considerable extent plaintiff, at one time, agreed with my view of what is "equitable" since a letter was written on October 22, 1968 requesting this "fair treatment" which "would involve full payments for all orders booked before October 1, 1968, regardless of when shipped."

The majority approves the "legal" conclusion that equitable estoppel must apply, but then relies on the "jury question" rubric in regard to the issue of what should fill the void created by disregarding the contract. I do not think that we can interfere with a contract in the name of equity and then ignore the question of the "equitableness" of the outcome of that interference. I would hold that Ehret is entitled to no more than that which would be received under the most liberal interpretation of Eaton's "normal procedure" as defined in the letter of April 29.

MAR 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1133

EHRET COMPANY, A CORPORATION,
Petitioner,

vs.

EATON YALE & TOWNE, INC., A CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case, but does not adopt Petitioner's description of the trial court's charge to the jury or Petitioner's analysis of the trial court's decision to grant a new trial.

At the first trial, Respondent tendered an instruction on how the jury was to interpret a written contract:

> In construing a written instrument, it should be read and considered as a whole. The intention of the parties is not to be gathered from detached portions of the instrument or from any one clause or provision standing by itself, but each part of the instrument should be viewed in the light of the other parts. One clause of the instrument may be modified or limited by another clause, and no word should be changed if, by considering the entire instrument, all parts of it may be interpreted to create one consistent plan.

This instruction was refused by the trial court. (T. 1. 529)* Instead of the rejected instruction, the trial court, gave the following instruction:

> The law does not say what extremely fair treatment means. That is for you to decide based on all the evidence which you find has a bearing on determining the intent of the parties. (T. 1. 648)

At the second trial at Respondent's request, the court gave an instruction on how the jury was to interpret a contract:

> In interpreting the agreement between Eaton and Ehret, you must determine the intention of the parties from the language they used. The meaning of the words the parties used is to be found by focusing on the words themselves and then drawing back and testing that meaning in the context of the entire agreement. This test must finally be read against the background of circumstances and the situation with which the parties were dealing.

In his opinion granting a new trial, the trial judge found the first verdict excessive because the jury, although it considered the totality of the circumstances affecting the parties' relationship, did not consider or measure that relationship against the language of the contract. (A. 4-6) By leaving out the content of the written contract, the jury failed in its duties and returned an excessive verdict. Under the circumstances, a new trial was required pursuant to F. R. Civ. P. Rule 59(a).

REASONS FOR DENYING THE WRIT

I. Plaintiff Was Not Deprived of Its Right to a Jury Trial

The Seventh Amendment to the Constitution specifically incorporates "the rules of the common law." Those rules give the trial judge the right to grant a new trial if he finds the jury's verdict to have been excessive or for other reasons. The common

* The abbreviation T. 1. refers to the transcript of the first trial. T. 2. refers to the transcript of the second trial; A. refers to Petitioner's Appendix.

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law has been codified in F. R. Civ. P. Rule 59. Indeed, exercising the power to grant a new trial pursuant to Rule 59, is "not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Aetna Casualty & Surety Co.* v. *Yeatts,* 122 F. 2d 350, 353 (4th Cir. 1941); 11 Wright & Miller, Federal Practice and Procedure, § 2806, page 49 (1973).

There is even some question of whether the trial judge's decision to grant a new trial can be reviewed at all, much less entirely disregarded. This Court's opinions state that the trial court's exercise of its discretion to grant a new trial is not subject to review:

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U.S. 480, 481 (1933); *Southern Ry.—Carolina Div.* v. *Bennett,* 233 U.S. 80, 87 (1914).

The commentators suggest that at present all eleven circuits do review the granting or denial of new trials to determine if the trial judge abused his discretion. (11 Wright and Miller, Federal Practice and Procedure, § 2820 (1973)) In this case, the Court of Appeals reviewed Judge McLaren's grant of a new trial and found that he had not abused his discretion:

> On appeal, the trial judge's opportunity to view the 'living courtroom' must be given great weight, especially when assessing the intent of the parties. We can find no abuse of discretion and accordingly affirm the judgment of the district court. (A. 16)

There is no support for Petitioner's assertion that the trial court "did not consider the same facts which the jury considered." (Petition, p. 5) The court did not, as Petitioner contends, ex-

clude from consideration the surrounding circumstances of the business relationship between the parties. (*Id.*) The court examined the business relationship in the light of the written agreement between the parties. (A. 4-6) The essence of Rule 59 and the common law is that the trial court must make an independent appraisal of the record in order to evaluate the jury's performance.

> Rule 59, Fed. Rules Civ. Proc. U.S.C.A., recognizes the old common-law principle that it is the duty of a judge who is not satisfied with the verdict of the jury to set aside and grant a new trial. As stated by Judge Parker, speaking for the court In Aetna Casualty & Surety Co. v. Yeatts (4th Cir.), 122 F.2d 350, 354, which also involved an appeal by a plaintiff who had, by failing to move for a directed verdict, precluded itself from challenging the sufficiency of the evidence to support the verdict, " 'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require' " *Charles* v. *Norfolk & Western Ry. Co.*, 188 F.2d 691, 695 (7th Cir. 1951); 11 Wright and Miller, Federal Practice and Procedure, § 2803 (1973).

There is no evidence that the trial judge failed to make an independent examination; it is the independence of that examination the Petitioner questions. Petitioner ignores the historic duty of examination that the Seventh Amendment requires of trial judges. If the Petition were granted and if Petitioner's contention were accepted, the independent review function of the district court which has been a part of jury trials since before the Constitution was adopted would be eliminated and Rule 59 would have to be declared unconstitutional.

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II. Petitioner Has Waived His Right to Challenge the Remittitur by Refusing to Accept the Remittitur

Remittitur was an alternative presented to the Plaintiff by the Court. The Court had found the verdict to be excessive, under Rule 59 this finding is grounds for granting a new trial.* However, the trial court offered Petitioner an alternative, Petitioner could accept what the court believed to be the maximum verdict consonant with the evidence or have a new trial. Petitioner was then faced with a choice: whether to risk a new trial and face the possibility of a lesser verdict or accept the remittitur and challenge the remittitur procedures. Petitioner chose a new trial. The second jury awarded them approximately $20,000 less than the amount of the trial court's remittitur offer.**

Petitioner's present challenge to the remittitur issue is doubly faulty: Petitioner never accepted the remittitur nor did it raise the question of the proper timing of a challenge to the remittitur to the Seventh Circuit. If Petitioner had accepted a remittitur and, after entry of that judgment, had appealed to the Seventh Circuit, Petitioner would be in a position to raise the question of the supposed differences in procedure relating to remittitur among the various circuits. It did not do so, therefore, the remittitur disappeared; all that remained was the trial judge's determination that an excessive verdict required a new trial. When the case was appealed after the second trial, the Seventh Circuit was not asked to review its remittitur procedures and has not passed on this issue. This Court has often stated that in general it will not review issues that were not presented to the court be-

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* Respondent has always contended that Petitioner's jury argument at the first trial was calculated to and did arouse the prejudice of the jury. Although the trial judge rejected this argument in granting a new trial, he did admonish Petitioner's counsel before the closing argument at the second trial. (T. 2. 439-40.) The Court of Appeals did not reach the issue of Petitioner's attorney's conduct because it decided that the trial judge had rightly exercised his discretion.

** The trial court offered a judgment in the amount of $137,-880.75. (A. 7) The second jury's verdicts totalled $120,000.

low. *Wood* v. *Strickland*, 420 U. S. 308, 327 (1975); *U. S.* v. *ITT Continental Baking Co.*, 420 U. S. 223, 226 at n. 2 (1975).

Petitioner has had precisely the kind of review of the remittitur order which would be permitted under the present practice of any of the Courts of Appeal; that is, whether the trial judge abused his discretion in granting a remittitur.

Although Petitioner does not relate the relief it seeks to the New Rule 59(f) it proposes,* it seems that the present writ merely seeks the approximately $20,000 differential between the second jury's verdict and the remittitur order. Even if this Court adopted the proposed rule suggested by Petitioner, Petitioner would not be any better off than he was under the Seventh Circuit's procedures. The second trial is over and the Court of Appeals specifically refused to find that the first jury verdict was within the reasonable range. (A. 16) This Court's earlier opinions would have precluded all review of a trial court's decision on motion for a new trial. Ehret has had, perhaps, more review than that to which it is entitled; it has not prevailed. It has succeeded in convincing one jury. Since that time the trial judge, another jury, and the Court of Appeals have all looked at Ehret's claims. None of them have concluded that the $540,000 awarded by the first jury is supported by the evidence viewed as a whole.

For the foregoing reasons, the Petition for Certiorari should be denied by this Court.

Respectfully submitted,

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* We are not aware that a Petition for Certiorari is a proper procedure for suggesting changes in the Federal Rules of Civil Procedure.

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